Authoritarian Liberalism and Modern Constitutionalism: A Material Perspective

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Authoritarian Liberalism and Modern Constitutionalism: A Material Perspective

Michael A. Wilkinson*

Abstract: This chapter examines the relationship between liberal constitutionalism and authoritarianism, where authoritarianism is taken as a form of governing that operates in opposition to democracy. Approached historically, modern liberal constitutionalism emerges to constrain the democratic impulse by differentiating between an economic and a political realm and protecting the economy from interference through various counter-majoritarian devices. Although this inbalance can be partially remedied by turning to a republican tradition which values political equality, republicanism often proceeds by way of normative abstraction. If instead we turn to the idea of the constituent power and the material constitution of the modern state, we can reconstruct how liberal constitutionalism configures (and reconfigures) the dynamic between democracy and capitalism in an authoritarian manner.

Keywords: Liberal constitutionalism, democracy, authoritarianism, republicanism, constituent power, capitalism

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I. INTRODUCTION

The purpose of this Chapter is to examine the confluence of liberalism and authoritarianism through the lens of constitutional theory and constitutional history. In one sense, the link is apparent: liberal states (states characterized as liberal or in which liberalism has been a dominant ideology) frequently resort to hard power to create and sustain political and economic order, whether in the form of violent and coercive "police powers" exercised through domestic repression at home or in imperial adventures abroad. As Franz Neumann put it in a previous era, the liberal state "has conducted warfare and crushed strikes; with the help of strong navies it has protected its investments, with the help of strong armies it has defended and extended its boundaries, with the help of the police it has restored 'peace and order.'"[1] Or as Karl Polanyi, in a similar period, put it, more pithily, in demolishing the myth of the spontaneous market imagined by liberals, "laissez-faire was planned; but planning was not."[2]

This "original sin" of liberalism was captured by Max Weber's notion of political capitalism and Karl Marx's analysis of the primitive accumulation of capital, which occurs in extra-legal and coercive fashion in anticipation of the circulation of free commodities that characterizes market liberalism.[3] As noted by more recent scholars, it is not only original accumulation that sets up the economic and social conditions for the market, but also the periodical recreation of these conditions through "accumulation by dispossession," meaning through re-distribution and re-production of resources by political and extra-legal means.[4] Social relations are transformed through direct and indirect forms of intervention which function to commodify, privatise, and marketize goods, to impose competitiveness and austerity, to shift private into public debt, and so on. The liberal capitalist state functions through a *continual transformation* of social relations, processes that set "in train distinctive imperatives of competition, profit-maximisation, the compulsion to reinvest surpluses, and the need to improve labour productivity by developing the forces of production."[5]

But if the exercise of hard forms of executive power sheds light on aspects of the liberal state that are sometimes obscured from view in constitutional theory,

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[1] Franz Neumann, 'The Change in the Function of Law in Modern Society' reprinted as chapter 2 of *The Democratic and Authoritarian State: Essays in Political and Legal Theory* (The Free Press, 1957) 22.
[2] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001 (1944)).
[3] Karl Marx, *Capital, Vol 1*, ch. 26 (Penguin, 2004). The identification of coercive forms of appropriation – whether through domestic corruption, war, or in forms of global imperialism ("political capitalism") - as central to the formation of the modern state is also stressed by Max Weber. See e.g. Richard Swedberg, *Max Weber and the Idea of Economic Sociology* (Princeton University Press,1998) 46 - 53.
[4] See David Harvey, *The New Imperialism* (OUP, 2003) 36.
[5] Ellen Wood, 'Logics of Power: A Conversation with David Harvey' (2006) *Historical Materialism* 9 – 34, 19 – 20.

there is little here that distinguishes the liberal state as such from any other type of state in the modern political world. Although useful in revealing the hypocrisy of certain liberal ideals of freedom and equality, of non-interference and restraint, it tells us nothing distinctive about the specific relation of liberalism to authoritarian forms of rule.

One way of pursuing this relation is to trace the original raison d'être of liberalism back to the protection of private property as a natural right. If initially a move designed to defend the interests of the bourgeoisie against the aristocracy and the monarchy in the early modern revolutionary period, this claim of right develops into a claim of political authority against the emerging working class in the nineteenth century. The transition from Sieyes's image of the "Third Estate" as the constituent power of the French revolutionary era to Marx's vision of the proletariat as the proto-universal revolutionary class triggers a switch in liberalism towards a reactionary defense of the status quo and towards conservative programs of constitutionalism.[6]

The commitment to constitutionalism, then, becomes a way for liberals to erect, bolster and conserve authority, against both the prospect of revolutionary socialism and the prospect of democratic socialism through universal franchise and mass democracy. This commitment is discursively justified by a type of authority claim which is distinct from that associated with the war-making and hard repressive capacity of the state captured by political capitalism and forms of imperialism, and it requires a distinct analysis.

Developing from a reaction to democratic freedom and political equality, this authoritarian feature of liberal constitutionalism would require a historical and comparative as well as a conceptual lens to examine in full. There is no space here to do justice to the historical trajectory or its various contours in distinct constitutional traditions.[7] I will instead examine the link between a dominant liberal ideology and authoritarian forms of governing. Authoritarian here is understood in contrast to democracy—a regime of political hierarchy in contrast to political equality. And my focus will specifically be on the relationship between liberal constitutionalism and authoritarianism, where constitutionalism refers both to juridical practice and to the constitutional imaginary.[8]

The claim that is pursued here is that liberal constitutionalism differentiates between the political and the economic realms in a manner which protects the

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[6] I trace this historical arc of constituent power in Michael Wilkinson, 'The Material Constitution and Constituent Power' (2025) Neisen et al (eds) *Oxford Handbook of Constituent Power*, forthcoming.

[7] The focus here is on various tensions arising within liberal constitutionalism at it develops in Western Europe and with some attention to the United States. For examination of the postcolonial context, see Sandipto Dasgupta, *Legalising the Revolution: India and the Constitution of the Postcolony* (CUP, 2024); Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press, 2020).

[8] See Martin Loughlin, 'The Constitutional Imagination' (2015) *Modern Law Review* 1 – 25 (the constitutional imagination refers to "the relationship between thought, text and action in the constitution of modern political authority").

economy from democratic authority and democratic control. The way it does so is partly ideological and partly institutional. It also turns out to be unsustainable in the long run due to periodic crises of legitimacy of the capitalist state. To present this, we will need to offer a compressed social history of constitutional ideas and constitutional law: we can then discern the outlines of the dynamic of liberal constitutionalism as it operates in a reactionary and even counter-revolutionary trajectory, against the "march of the masses onto the stage of history."

The chapter unfolds as follows. Part II offers a stylized reconstruction of the various ways the modern liberal constitutional imaginary differentiates between a political and an economic realm and asserts the primacy of the latter. In Part III, we consider a contrast in the way republicanism classically inverts the liberal priority of the economic over the political realm, and problematizes material inequality, albeit in recent deliberative versions only by substituting one normative theory for another and losing its critical bearings. In Part IV, we will examine the notion of constituent power, which is occluded in the modern constitutional imagination but can be brought back into view by considering the materiality of the modern state. We develop this point in Part V by examining the dynamic disequilibrium of democracy and capitalism, exemplified in the work of Karl Polanyi, and present this as a constitutional dynamic that does not reflect merely an exceptional pathology of liberalism but an ongoing tension in the process of constitutional ordering.

II. THE MODERN CONSTITUTIONAL IMAGINARY

In a stylized picture of the modern constitutional imagination, the political and the economic are envisaged as two distinct and autonomous domains, which operate according to different logics. In short, the political domain is based on formal equality and "coerced co-operation," in the sense that there is equality before the law and the state will use force to ensure that individuals perform their duties and obligations with respect to others. The economic realm is based on material inequality and "voluntary competition" in the sense that it offers the prospect of maximizing individual wealth through free exchange in the marketplace.

This reconstruction roughly matches distinctions between state and market, citizen and consumer, public and private, duties and rights. There is of course a huge literature—in political theory, the history of ideas, and critical legal theory—mapping but also problematizing each of these binaries, which has questioned the "supposedly non-coercive state" of liberal laissez faire ideology.[9] The aim here is to

[9] Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) *Political Science Quarterly* 470 – 494.

investigate how these distinctions inform constitutional thought and how the process of constitutionalization modifies them.

The function of differentiating a political and an economic domain is performed by various constitutional devices: a legal system based on formal equality of rights, free and fair elections, the separation and independence of governmental powers, judicial review of administrative (and sometimes legislative) action. It is also sustained by background ideas and a culture of equal liberties, democratic citizenship, and duties of governing on the one hand, and market rationality, equality of opportunity and individual rights on the other. In performing this function, constitutionalism performs a role that is partly concrete, but partly ideological, in that it sets boundaries for the terms of political legislation, and, if informally, for the terms of political debate.

Differentiation of the economic and the political domain features in the modern constitutional imagination in distinct ways. In Anglo-American liberal-libertarian accounts, a set of rights imposes side-constraints on the political process.[10] The notion of "natural right" standing behind these developments of course has a long history, going back at least to the early modern founding of social contract theory, which legitimizes government on the basis of the protection of individual rights of property. In the libertarian tradition, personal liberties, including property rights, may only be interfered with to provide for those features of the state that are strictly necessary for its reproduction as a minimal market state. In more egalitarian versions, such as Rawls's theory, the focus is on securing broader basic equal liberties and, secondarily, a degree of justice in socio-economic relations. But it remains in a mode of philosophical differentiation, in Rawls's case, of the priority of basic liberties over socio-economic differentials, or agreement on constitutional essentials over the ordinary democratic process.[11]

The differentiation of the political and the economic, or public and private, is also operative in a tradition of continental liberalism derived from Kant's doctrine of political right. The universal principle of right, which establishes a framework of equal liberties, and independence from the will of others, establishes what is rightfully "mine and thine" in a way that disregards existing material inequalities and places no duty on the state to mitigate them.[12] This frame became referred to in the continental European context as the bourgeois *Rechtsstaat*, the constitution (*qua* rule

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[10] The classic is Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974).

[11] Rawls built his political liberalism on the constructed ground of "reasonable" conceptions of shared "constitutional essentials"; on the assumption that political power should only be used in ways that citizens "may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason" (John Rawls, *Political Liberalism* (Columbia University Press, 1993) 137). This approach is subject to a powerful critique from a democratic perspective by Sheldon Wolin, 'The Liberal/Democratic Divide: On Rawls's Political Liberalism' (1996) *Political Theory* 97 – 119.

[12] For discussion, see Robert Pippin, 'Mine and Thine? The Kantian State' in P Guyer (ed.), *The Cambridge Companion to Kant and Modern Philosophy* (CUP, 2006) 416 – 446. For a different interpretation of Kant's position on property, see David James, *Property and its Forms in Classical German Philosophy* (CUP, 2023).

of law) guaranteeing ownership of the means of production, property rights, freedom of exchange, and freedom to contract.

Liberal constitutionalism typically makes and marks this differentiation by protecting a domain that is "out of bounds" for the ordinary political process. To be sure, even if the separation between the political and the economic is established in principle, the precise boundary line may be a matter of contestation, a point to which we will return. But the key point is that on the premise of the differentiation of the political and the economic realms, the economic domain is idealized as systemically autonomous; it is governed by a distinct "market logic" and material inequality is naturalized and de-politicized.

In more recent German "ordoliberal" formulations, market logic may be complemented by the imperatives of competition, as well as the rules and regulations of competition law, which aim to temper the logic of pure capital accumulation and avoid the pathologies of monopoly capitalism.[13] In allocating an explicit role to the strong state in guaranteeing a sound economy, the ordoliberal goal is to secure the market from supposedly irrational democratic interference.[14] Although ordoliberalism differs from libertarian and classical liberal accounts of natural rights as well as from the spontaneous order of the neoliberal imagination, it too moves away from a conception of popular sovereignty at the foundations of constitutional order.[15]

In ordo- and neoliberal formulations, the political realm increasingly appears to be derivative or secondary to the economic. In one sense this reflects the attempt to reclaim deep-rooted liberal assumptions about individual rights. So the foundational status of the economic realm is patently taken for granted on the assumption of pre-political rights to property, with the notion of a right to property existing between a person and a thing that the social contact is designed, and the state called upon, to protect. But as a historical matter, ordoliberalism and neoliberalism become more politically significant as the principles of the bourgeoise *Rechtsstaat* are contested with the emergence of mass democracy and powerful socialist parties (as well as the spectre of revolutionary socialism) in the twentieth century.

As constitutional theorist Carl Joachim Friedrich noted already in 1955, the decisive theoretical turn triggered by ordoliberalism had been to replace popular sovereignty with individual economic freedom—a freedom to participate in the market—as the legitimating device for the whole constitutional order.[16] And as

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[13] Sean Irving, 'Limiting Democracy and Framing the Economy: Hayek, Schmitt and Ordoliberalism' (2018) *History of European Ideas* 113 – 127.
[14] See Kanishka Jayasuriya, 'Globalization, Sovereignty and the Rule of Law: From Political to Economic Constitutionalism' (2001) *Constellations* 442 – 460.
[15] One of the first to notice this was Carl Joachim Friedrich, see 'The Political Thought of Neo-Liberalism' (1955) *The American Political Science Review* 509 – 525.
[16] ibid.

Foucault would later explore in his lectures on neoliberal governmentality in 1979, "economic constitutionalism" would come to signify more than the conditioning of political authority by particular economic interests and ideas; it would signify *the principle of the economic* as the principal ground of authority for the "constitution" of the polity as a whole.[17] With the economic realm resuming a foundational status, market logic potentially colonises the totality of social and political relations, dominating the constitutional imagination in the late twentieth century.[18]

III. FROM LIBERALISM TO REPUBLICANISM

Unlike a political order which is characterized by and depends on the accepted idea of a hierarchy or fixed arrangement in the ruling relationship, the modern constitutional order is paradigmatically one which claims to be democratic in form, and aspires to the complete interchangeability of rulers and ruled or to some notion of *political equality*.

On a strict reading of the liberal project, the value of democracy appears uncertain, an instrumental, contingent function of its capacity to protect private property or safeguard the free market economy. In other words, democracy's value lies in the possibility that it happens to be the more effective way of protecting economic liberalism. In that case, democracy has no intrinsic value. In Habermas's reconstruction of the liberal model, "the democratic process accomplishes the task of programming the government in the interest of society, where the government is represented as an apparatus of public administration, and society as a market-structured network of interactions among private persons."[19]

But this is not the only model of democracy produced in the modern constitutional imagination. It is for this reason that we need to complement our analysis of liberal constitutionalism with the tradition of modern republicanism, which underlines the particularity of the liberal (and neo- or ordoliberal) constitutional imagination by flipping it on its head in one significant respect. The modern republican constitutional imagination is premised not only on the autonomy of the political from the economic realm but on its primacy, operating with a basic differentiation of public from private which privileges the former.

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[17] Michel Foucault, *The Birth of Biopolitics—Lectures at the College de France 1978-1979* (Palgrave MacMillan, 2008). It has recently been suggested that Foucault's analysis on ordoliberalism drew on the 1961 thesis of Francois Bilger, see Arnaud Lechevalier 'Why and How has German Ordoliberalism Become a French Issue? Some Aspects about Ordoliberal Thoughts we can Learn from the French Reception' in Joerges and Hien (eds.), *Ordoliberalism, Law and the Rule of Economics* (Hart Publishing, 2017) 23 – 48.

[18] See e.g. Emilios Christodoulidis, 'The European Court of Justice and 'Total Market' Thinking' (2013) *German Law Journal* 2005 – 2020.

[19] Jürgen Habermas, 'Three Normative Models of Democracy' (1994) *Constellations* 1 – 10.

The political economy underlying Jean-Jacques Rousseau's social contract is instructive here, as a contrast to modern liberal assumptions. As is well known, Rousseau's social contract offers the promise of transcending the aggregate of individual interests in the formation of a general will or common good. Looking beyond his social contract, and to his overall intellectual scheme, which privileges political equality and non-domination, private property and money assume a derivative status.[20] Moreover, if paired with Rousseau's discourse on inequality, which treats the claim to private property as the original sin of civil society and critiques the *amour propre* engendered through commercial society as a corruption of the natural self-interest of man, we can identify a distinct Enlightenment path from the one that ends in ordo- and neoliberalism.[21]

In the contemporary "neo-republican" imagination, the difference with liberalism is often narrowed, but the focus remains distinct: on procedural and structural aspects of political rule, and on establishing a framework of democratic control, potentially prioritizing issues such as freedom of association and political speech, representative electoral processes, limits to campaign finances, and optimally a vibrant public sphere and democratically engaged citizens. [22] It also demands a political and justice system that cannot be straightforwardly "bought" by private interests, that guarantees impartial adjudication of disputes, a multiplicity of views in the public sphere, and so on. These features will require substantive provision for the power to generate and collect material resources through taxation and spending. The republican will be wary of restrictions on the political process by constitutional guarantees, such as those which protect the right to property and contract.

The last issue illustrates an obvious but important point, which is that there is a dependency as well as a tension between the two domains—political and economic—and that important differences of emphasis between liberal and republican constitutionalists emerge. Contemporary republicans emphasize freedom as non-domination and insist that the public sphere only functions on the basis of *active* political equality. This means taking seriously various forms of domination that may be missed by focusing only on formal legal equality and even by focusing only on horizontal "justice as fairness" among persons in terms of socio-economic benefits. As Phillip Pettit argues, the republican centers the question of political legitimacy based on the notion of democratic control of the state and holds on to the idea of popular sovereignty.[23] They may also emphasize

[20] See further Marco Goldoni, 'Rousseau's Radical Republicanism' in Michael Dowdle and Michael A. Wilkinson (eds), *Constitutionalism Beyond Liberalism* (CUP, 2017).
[21] Jean-Jacques Rousseau, *A Discourse on Inequality* tr Maurice Cranston (Penguin, 1984). It is notable that postwar liberals often saw in Rousseau only the totalitarianism of the Jacobins (see Friedrich, above).
[22] See e.g. Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP, 2012).
[23] Philip Pettit, 'Legitimacy and Justice in Republican Perspective' (2012) *Current Legal Problems* 59 – 82.

that whatever personal rights the liberal holds dear will in practice require defense through a robust system of public liberties; only a vibrant and demanding public will be able to hold power to account.

But if liberals and republicans differ in terms of the respective weight given to public and private autonomy, this now often comes to resemble a "family quarrel" rather than distinctive and opposing theoretical positions.[24] Many thus attempt to combine their insights, most famously perhaps, under the influence of Jurgen Habermas's "co-originality thesis." Habermas tries to take what is significant from both liberal and republican traditions, and offers a "third alternative" model, a deliberative democracy based on the internal relation between the rule of law and democracy, and the co-dependence of fundamental rights and popular sovereignty.[25] By taking the republican's focus on legitimacy in the political realm but losing the insistence on any kind of homogenous political community, Habermas's deliberative model has acted as an inspiration for those seeking to revitalize the democratic public sphere and at the same time transcend the nation-state model of political organization.

However, the deliberative-democratic inflection of the republican model, which was highly influential in normative constitutional theorizing, signalled a disconnect between an idealized vision of democracy and the concrete movements of the *demos*. This was particularly egregious in the context of European integration, with Habermasian theory moving to embrace versions of post-nationalism, post-sovereignty, and post-democracy.[26] As a matter of political and constitutional theory, the Habermasian substitution of the autonomy and primacy of the political realm for a rational consensus of future agreement received powerful critique from radical democrats for its elision of the phenomenon of power.[27]

Moreover, many contemporary deliberative-republican models remain implicit about the differentiation of political and economic realms. To be sure, there is concern at the margins about the way excessive inequality corrupts the political process or excessive commodification degrades moral values.[28] This reflects concern that the autonomous logic of the economy could have destabilizing effects if it leads to "extreme inequality" and that it should therefore be limited. But this is considered either to be a moral issue, or an exceptional one, to be problematized when the normal way of things suffers some kind of external shock, moment of crisis or ethical aberration. In the Habermasian version, the economic system is

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[24] Jürgen Habermas, 'Reconciliation through the Use of Public Reason: Remarks on John Rawls's Political Liberalism' (1995) *The Journal of Philosophy* 109 - 131.
[25] Jürgen Habermas, *Between Facts and Norms: Towards a Discourse Theory of Law and Democracy* (MIT Press, 1995).
[26] I explore this in greater depth in Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (OUP, 2021).
[27] See especially Chantal Mouffe, 'Deliberative Democracy or Agonistic Pluralism' (1999) *Social Research* 745 – 758.
[28] See e.g. Michael Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Farrar, Straus and Giroux, 2012).

essentially surrendered to the interplay of private interests, separating system from lifeworld, and with capitalism declared the only game in town. We have effectively ended up full circle at the primacy of market logic and, at this point, any residual critical thrust has been lost. How might critical theory regain its bearings?

IV. RESTORING THE NOTION OF CONSTITUENT POWER AND THE CAPITALIST STATE

Although republicanism and deliberative democracy have the advantage of foregrounding the issue of political equality and the question of the legitimacy of constitutional arrangements and, if presented in the form of abstract social contract theories, may offer normative guidance in some possible world but tell us little about a constitution's material development in this world. And if the constitution *qua* positive constitutional norms performs the task of assuring a relative autonomy of both spheres, political and economic, there is a prior question which asks what grounds the authority of the constitution itself? This question is rarely asked in the mode of normative theorizing. In fact, it is now suggested by some scholars that the question simply be abandoned.[29] The constitution is free-standing, a set of norms justified via a thought-experiment, an approximation of a future-oriented rational consensus, a pre-commitment established in some lucid but mythical moment of sober deliberation or a reflection of the self-sustaining moral value of liberal legality.[30]

This mode of theorizing elides the question of constitutional authorization—of how the constitution is made, and changes over time in ways that are not previewed by its own terms, or in ways that are in direct tension with them. One way into an investigation of this dynamic of constitutional authority is through the thorny issue of constituent power, the power to make or break a constitution, or indeed to amend it in abnormal or unforeseen ways. It also raises the question of whether and to what extent constituent power remains a relevant material force in any particular society.

In one respect, the claim that a political community can make or break a constitution sounds like a truism barely worthy of note, even if there are attempts

[29] Sergio Verdugo. 'Is it time to abandon the idea of constituent power?' (2023) *International Journal of Constitutional law* 14 – 79.

[30] Cf. various attempts to do away with constituent power, see e.g. David Dyzenhaus, 'The Politics of the Question of Constituent Power' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent power and Constitutional Form* (OUP, 2007); or to tame it, see e.g. Rafael Fasel, 'Constraining constituent conventions: Emmanuel Joseph Sieyès and the limits of *pouvoir constituant*' (2022) *International Journal of Constitutional Law* 1103 – 1129.

to make change more difficult in respect of certain constitutional norms and even to make some norms unamendable. Ultimately, even unamendable constitutional provisions can be amended through extra-constitutional means, and entire constitutions overhauled through revolution, popular or otherwise. At least, that is, so long as there is some belief in the autonomy of the political realm and a capacity for collective political action. So, in that sense, underlying the assumption of modern constitutional theory must be the autonomy, and even primacy, of the political, even if this is not always explicitly recognized.

The autonomy of the political, *qua* constituent power, is thus expressed both in the founding revolutionary moment or myth of leaving the state of nature and in the return of exceptional politics in the crisis or emergency situation, represented in a clear line of thought running from Hobbes through to Schmitt.[31] But the way the autonomy of the political is materialized requires analysis of the constitution of the state as well as the positive constitution, or the constitutional pact as well as the constitutional contract.[32] If "a people" must first exist before it can commit itself to anything, early social contract theory both acknowledges this point and conceals its historical character. The multitude, as Hobbes called it, becomes a unity by virtue of the mythical social contract agreed among them as roughly equal individuals in the state of nature. Schmitt's own solution to this problem of foundations (or at least one of them offered among his various shifting positions) is to appeal to a constitutional identity behind the merely positive constitutional law in order to defend the substantive constitution of the *bourgeoise Rechtsstaat* against the threat of mass democracy.[33]

From the mid-twentieth century, the notion of an active constituent power is repressed in a constitutional culture where the constitution itself appears set in stone, at least regarding a certain core set of provisions. The dominant influence of postwar U.S. and German constitutional thought perhaps explains a certain elision of constituent power, because of the hegemony of relatively entrenched systems and conservative-liberal constitutional cultures, with increasingly authoritative apex courts. But as recent developments suggest, from the German Constitutional Court's difficulties in dealing with the constitutional challenges of European integration, to the rise of executive power and "common good constitutionalism" in the U.S., and from the rise of populist movements worldwide to the various crises of liberal constitutionalism, entrenchment may be less secure than some might have imagined.

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[31] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (University of Chicago Press, 2005).
[32] For extended discussion see Martin Loughlin, *Foundations of Public Law* (OUP, 2010).
[33] Benjamin Schupman, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (OUP, 2017) 180: "Schmitt repeatedly argued that the Weimar Constitution contains a political decision to be a bourgeoise *Rechtsstaat*, which was above all oriented by its commitment to individual liberty." See also Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff, 1998): according to Cristi, making the distinction between liberalism and democracy enabled Schmitt's rapprochement with liberalism as early as 1923. It allowed him "to identify what he feared most: the increased pace of the democratic revolution" (p 17).

Mainstream constitutional theory has typically evaded these sorts of issues by imagining the liberal state, in a Rawlsian move, to be neutral vis-à-vis comprehensive doctrines and normatively reliant on the exclusion of "unreasonable" comprehensive doctrines. The liberal state then appears as a neutral state, or a reflection of the overlapping consensus of diverse but reasonable beliefs in and about the public realm. In this way of thinking, it is natural to appeal to a constitutional guardian to protect a core set of "constitutional essentials."[34] Illiberal constitutional projects are simply placed beyond the pale of acceptable political discourse. But this is to substitute normative political theory for concrete constitutional analysis.

There is, however, a different, historical and material aspect of the constitutional state, which can be brought into view in order to reintegrate the issue of constituent power and its relationship to political authority. One way to do this is to view the state as the political form of capitalist society. The point then is to move away from the sheer *idea* of the state or the state as a "scheme of intelligibility" and approach its material constitution.[35]

To pursue this line of enquiry, we need to consider a different story to the one of secularization that is so prominent in the modern constitutional imagination. This alternative story shows how the modern state comes to represent a separation of political and economic power as the market and state become differentiated in modern capitalism, a story which is missed if the autonomy of the political is presented merely as an achievement of the process of secularization, represented symbolically as a break from a theological mindset. This narrative is not told as a "rupture," but as a gradual, episodic, ongoing struggle for political-economic hegemony, not only by the bourgeoise against the ancien régime, but subsequently as an alliance of class forces against the working class, particularly as it is integrated into the franchise. These battles are fought over social power and material resources as well as ideology and political representation. They are combined and uneven across nations, integrating inter-imperial rivalries as well as anti-imperial and anti-colonial struggles in the late nineteenth and twentieth centuries.[36]

The differentiation of the political and the economic is then a dynamic, two-sided affair, rather than the one-off rupture from religion sealed by the event of secularisation. To keep both sides in sight has the advantage of thrusting into view the consequences for political ordering of the relative autonomy of the economic, which contemporaneously—ideologically as well as materially—evolves in the

[34] See generally Frank I. Michelman, *Constitutional Essentials: On the Constitutional Theory of Political Liberalism* (OUP, 2022).
[35] See further, Marco Goldoni and Michael A. Wilkinson, 'The Material Constitution' (2018) *Modern Law Review* 567 – 597.
[36] See Samir Amin, *Eurocentrism: Modernity Religion, and Democracy: A Critique of Eurocentrism and Culturalism* (Monthly Review Press, 2007); Dasgupta, Khosla, above.

liberal constitutional state. In other words, we can see the implications of presenting the economy as relatively autonomous from the political, paradigmatically expressed in classical as well as newer forms of liberalism in the idea of the self-regulating market, the myth of the invisible hand, the moral sanctity of debt and contract, the approximation of conditions of perfect competition etc. The term "evolves," however, must not conceal that the autonomy of the economic is the result of explicit and deliberate political and constitutional changes. Within this realm, inequality and market logic is legitimated, justified, or naturalised, and public and collective goods are privatised and de-politicised.[37]

This line of thought also highlights the material and representative logic of the constituent power—evident in the work of Emmanuel Sieyes as well as in the tradition of political Marxism. It is not to assume, in the way 19th century socialist Ferdinand Lassalle suggested, that the "real constitution" is a straightforward copy of the material relations in society and the formal constitution merely a "sham."[38] Rather, from this perspective, the revolutions of the late eighteenth centuries are bourgeoise revolutions against the ancient regime that sought, and to some degree achieved, political emancipation (albeit in an uneven manner), but only of some. Then the question emerges as to the relation between the "relative autonomy of the political realm" and the materiality of social struggle against capitalist exploitation in the long nineteenth century as more radical republican and socialist movements sought to overturn the property relations of the liberal bourgeoise order. [39]

Even if we narrow our focus to the question of political emancipation, the autonomy of the political would have to account for a struggle that was intertwined with material social relations, for example, in the fight for universal suffrage without property qualification, as the franchise is extended to workers and to women; for the rights to industrial association and solidarity of union membership; later in the discourse of social citizenship for social and welfare rights and so on. The degree to which political emancipation can achieve real freedom within a liberal market economy then takes us into a dispute between reformist and revolutionary branches of the Marxist tradition, which continues right up to the present day.

This is not the place to offer a complete social-historical theory of the state and state-system from a materialist perspective. But if the modern constitutional imagination is framed by the state as a capitalist state, there is no longer the appearance of "neutrality" with regard to comprehensive economic doctrines and to political-economic ideology, nor with regard to specific social relations, geopolitical dynamics or interstate rivalries. This is not to say that the state is merely "the executive committee of the whole bourgeoisie," and many, including those in

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[37] According to Wood, 'Capitalism alone has created an autonomously economic form of domination', in 'Logics of Power', above, 13.

[38] Ferdinand Lassalle, 'On the Essence of Constitutions' tr E O'Callaghan (1942) *Fourth International* 25 – 31.

[39] On the relative autonomy of the political realm from a Marxist perspective, see e.g. Nicos Poulantzas, *State, Power, Socialism* (Verso, 2000).

the Marxist tradition, have developed theorizations of the relative autonomy of the state from immediate and direct interests of particular capitalists or "fractions of capital."[40]

The point is that bringing in a material perspective enables an examination of the dialectical interrelation of political and economic logics at play not only in the ordinary circumstances of politics but also in the fundamental constitutional imagination. So it would be a mistake to focus only on the play of ordinary politics and point to the existence of liberal as well as socialist parties and policies as demonstration of this background neutrality, or as evidence of a level playing field between different visions of political economy. As suggested above, ordinary politics operates on the basis of a series of background constitutional assumptions, rules, ideas, and cultures, as well as material interests, ranging from the protection of private property to myths around hyperinflation. The relative autonomy of the political then looks like a material struggle all the way through, waged in historical battles between labor and capital, by workers, women, racialized groups, anti-colonial movements etc. These are waged, if not always explicitly, as democratic struggles. These battles are ongoing *as a basic constitutional matter* whether it is the legal protection of property rights in a manner that restricts the capacity of the state to raise resources through taxation, the banning of communist parties as unconstitutional, the protection of freedom of establishment in a way that restricts the right to strike, or the management of the Eurozone in moments of financial crisis.

V. DEMOCRACY VERSUS CAPITALISM—OR, WHY LIBERALISM BECOMES AUTHORITARIAN

In the material constitution of a society which is not just democratic but also capitalist in form, upholding the notion of equal political freedom is not an abstract exercise or presupposition. It does not transpire as a moment of symbolic or normative revelation but unfolds over time through democratic struggles and movements of solidarity and emancipation. It might also be foreclosed by de-democratising and de-politicising movements of constitutionalism, constitutional myth-making, and institutional and technocratic forms of constitutionalization which function to constrain or even repress democracy.

It is in this reactionary form that we can more clearly identify the authoritarian aspect in liberal constitutionalism as a historical project. If the autonomy of the political on which constituent power rests is approached as a democratic, political,

[40] ibid.

and social struggle, it continually comes up against the authority of the liberal constitutional regime. Political democracy, in Claude Lefort's terms, is a struggle for the place of power to remain "empty"—one that is fully material in nature because it has to contend with the dynamics of economic (and geo-economic) systems and the inequalities they generate as well as the de-politicizing effects of legal and technocratic power and authority.[41] This has only become more pressing in the struggle against the increasingly conspicuous inequalities of advanced capitalism in the 21st century and new regimes of market thinking and "ordo-constitutionalism," particularly in the supranational arena.[42]

From this perspective, the strains on the autonomy of the political that appear in critical historical conjunctures can be seen as the upshot of crises of *democratic capitalism*, as the capitalist state reacts to the reawakening of the demos. But although destabilization is heightened in critical moments, crises of democratic capitalism reflect a general underlying tension, or "disequilibrium," between the logics of democracy and capitalism, community and individualism, solidarity and competition. This set of material dynamics is central to the process of political ordering and re-ordering as outlined by Wolfgang Streeck, who extends it in a compelling way to the recent phase of democratic capitalism since the crisis of the 1970's and then the global financial crisis of 2008.[43]

Streeck builds on Karl Polanyi's earlier intervention in order to reconstruct the pathologies of the liberal constitutional state. In tracing the relationship between authoritarianism and liberalism, Polanyi sketched out how the market society across the 19th century was planned and implemented by authoritarian politics, rather than spontaneously, as those advocating laissez-faire imagined.[44] He notes how constitutionalism in the United States developed as a means to separate the people from the exercise of power over their own economic life, putting private property "under the highest conceivable protection" and making voters powerless against the wealthy elite.[45] "Inside and outside England," writes Polanyi, "from Macauley to Mises, from Spencer to Sumner, there was not a militant liberal who did not express his conviction that popular democracy was a danger to capitalism."[46]

This tension is ignited in the interwar period with the emergence of universal suffrage, mass democracy, and large-scale political parties representing the working class. It reaches acute form in Weimar Germany, when Hermann Heller coins the term "authoritarian liberalism" to target the Presidential cabinets ruling Germany

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[41] See Claude Lefort, 'The Question of Democracy' reprinted in *Democracy and Political Theory* tr D. Macey (Polity Press, 1988) 9 – 20.
[42] See Martin Loughlin, *Against Constitutionalism* (Harvard University Press, 2023).
[43] See e.g. Wolfgang Streeck, 'Taking Capitalism Seriously: Towards an Institutionalist Approach to Contemporary Political Economy' (2011) *Socio-Economic Review* 137 – 167; Wolfgang Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso, 2014).
[44] See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001 (1944)).
[45] ibid 233.
[46] ibid 234.

before the Nazi seizure of power, as well as the theorist advising them, Carl Schmitt. In his *Verfassungslehre*, Schmitt had warned of the danger of proletarian democracy overturning the bourgeoise order. He ultimately identified the Weimar constitution with the bourgeoise *Rechtsstaat* in an attempt to conserve it against the threat of mass democracy.[47] It is for this reason that Schmitt's position, before turning to the Nazi party, was critiqued by Hermann Heller as an "authoritarian liberalism."[48]

Polanyi notes how the pattern of authoritarian liberal reaction to economic crisis in the interwar period was far from unique to late Weimar Germany—right across the globe, countries tried to maintain the political-economic demands of the Gold Standard, fiercely resisting social democratic programs until, eventually but unevenly, countries abandoned Gold and market liberalism, leading, for example, to Welfarism in Britain and the New Deal in the U.S. According to Polanyi, the more fiercely countries resisted social democracy in the name of economic liberalism and sound finances through authoritarian government, the stronger and fiercer the eventual backlash would be.[49] Authoritarian government hollowed out democracy, ultimately weakening its ability to respond to the fascist threat when it arrived. It was, in other words, the authoritarian turn of liberalism that prepared the ground for fascism. Fascism itself, harnessing a cult of violence and based on an ideology of racial superiority, was characterized not by hyper-politicization but by the destruction of the political realm in a way continuous with its erosion in liberal thought.[50]

Polanyi's account of land, money, and labor suggests that the autonomy of the political depends on maintaining democratic control over these "fictitious commodities," or at least the political capacity to condition society against market forces and the capitalist economic logic of accumulation, distribution, and production that acts upon them. The interwar interregnum specifically shows that the process of constitutional ordering hinges on a political-economic relation that exists in a delicate balance between the material forces of capitalism and democracy and that constitutional development is subject to the vagaries of this conflict as well as marking, and to some degree controlling, its shifting boundaries.

The postwar era exemplifies the role of myth-making in the process of constitutionalisation as interwar collapse is blamed on excessive democratisation and majoritarianism. Liberal constitutionalism is placed on a new footing, one in which ideologies and institutions of counter-majoritarianism come to constrain and restrict democracy in terms of its competence and capacity to determine economic

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[47] See Shupmann, above.
[48] Hermann Heller, 'Autoritärer Liberalismus' (1933) *Die Neue Rundschau* 289 – 298 (Hermann Heller, 'Authoritarian Liberalism?' tr S. Paulson (2015) *European Law Journal* 295 – 301.
[49] Rejecting purely local or historical explanations for the situation that gave birth to fascism, "in reality", Polanyi insists, the part it played was determined by one factor: "the condition of the market system," above, at 250 – 265.
[50] See further Michael A Wilkinson, 'Hermann Heller's Critique of Liberalism' (2024) *Jurisprudence* 1 – 23.

and social questions.[51] In postwar Europe, the frame of differentiation between the political and the economic is paradigmatically guarded by a constitutional court in charge of protecting liberal norms along with a constitutional culture that values independent expertise, such as that provided by central banks. Throughout the postwar period, these types of constraint are increasingly outsourced to international institutions, protecting a transnational economic domain that is divorced from any meaningful narrative of democratic self-commitment or political correction. Ordoliberalism is upscaled through the commitments that come with the project of creating a European economic community and then the European Union. The Italians have a useful term for this process of increasingly rigidified regimes in the context of European integration: a *vincolo esterno* or "external constraint."[52] Since there was not a clear legal avenue of exit from the single currency, the framework of Economic and Monetary Union established at the Treaty of Maastricht in 1992 effectively became an "alienation" rather than an "agency" contract, to adopt Jean Hampton's terminology. [53] In other words, there was no formal option of reclaiming sovereignty over money short of full exit from the European Union, creating a clear imbalance in favour of capitalism over democracy, markets over peoples, through the construction of hard constraints on the political-democratic process.

Constitutional regimes are varied in rigidity in the way they establish boundaries on the right to rule over the economy. Market logic can be locked in by constitutional devices that are relatively counter-majoritarian in form and purpose but rigidity in practice comes not only from hard legal restraints but from how political discussion is constituted. It is necessary to capture not only formal channelling but also constitutionalism's framing function, the way a constitution (understood broadly) establishes how political debate is to be organized, and what its limits are.[54] Thus the TINA narrative (there is no alternative to neoliberal structural reform) may have a constitutional and even supra-positive constitutional-legal quality associated with it, to the extent that certain discourse becomes hegemonic in a particular society and other options considered beyond the pale of acceptability. Constitutional change can come about without changing the formal constitution and through avenues other than the formal amendment procedures. And as a matter of political economy, the relationship between democracy and capitalism does not follow a linear narrative but can move in relatively progressive or regressive directions.

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[51] See Michael A Wilkinson, 'Constitutionalism in Postwar Europe: Revolutionary or Counter-Revolutionary?' in Marco Dani, Marco Goldoni, and Agustín J. Menéndez (eds.), *The Legitimacy of European Constitutional Orders: A Comparative Inquiry* (Edward Elgar, 2023).

[52] See Kenneth Dyson and Kevin Featherstone, 'Italy and EMU as a *vincolo esterno*: Empowering the Technocrats, Transforming the State' (1996) *South European Society & Politics* 272 – 299.

[53] See Jean E Hampton, *Hobbes and the Social Contract Tradition* (CUP, 1986), especially ch 9.

[54] As Gavin Anderson puts it, "constitutional discourse is always more than the rules it generates or legitimates..., setting the parameters not just for how politics is contested, but what is deemed politically contestable." See Gavin Anderson 'Constitutionalism as Critical Project' in Stephen Gill and A. Claire Cutler (eds), *New Constitutionalism and World Order* (CUP, 2015) 283, quoting Christodoulidis.

In conclusion, the purpose of this Chapter has been to restore into constitutional theory the dynamic between the political and economic realms, and to argue that this is played out as a constitutional question of democratic authority. More specifically, the Chapter has sought to show the role that constitutionalization plays in directing and re-directing, controlling and curtailing this authority—not only at the micro-level of property-contractual relations (property rights, freedom of contract), but at the macro-level of political economy (e.g. protections of free trade, constraints over tax and spend, the imposition or suspension of austerity rules and fiscal constraints, institutional counter-majoritarianism). This dynamic can of course cut both ways, as legal, political, and social movements of re-politicization can also occur, demands for reclaiming the public domain or "the commons," as witnessed recently in some of the democratic responses to the global financial crisis over the last decade and a half. This also raises the thorny question of the necessity of constitutional "rupture" from the current state and inter-state paradigm of authoritarian liberalism in order to restore the notion of constituent power and democratic authority.

The relevant constitutional problem posed by modern democratic capitalism is clearly historical and material in nature. Authoritarianism is not, or not only, an exceptional pathology of liberalism; it is chronic. As the dynamic of democratic inclusion historically expands and extends the demand for material goods, and for relative material equality, calling for redistribution or changes in the conditions of production, it puts pressure on the differentiation of the political and the economic realms. As individuals, groups, and classes strive for political emancipation in the struggle for universal franchise, for basic political equality, their demands place exacting material burdens on the governing arrangements of the state as well as changing the basic ideas of collective autonomy. These are not only political struggles narrowly conceived, but struggles for the transformation of material social relations, for "effective autonomy," to adopt the terminology used by Cornelius Castoriadis.[55] They face the formal and informal authoritarianism of a liberal regime that at least since the interwar era has exhibited a reactionary posture, using constitutionalism as one of its most potent tools. They may also now face movements of an authoritarian conservativism that inflects against liberal values but resolutely refuses to restore any link between constitutional authority and democracy or to confront the social and material challenges of modern capitalism.[56]

[55] See Cornelius Castoriadis, *Philosophy, Politics, Autonomy: Essays in Political Philosophy* tr D. Ames (OUP, 1991).

[56] See e.g. Adrian Vermeule, *Common Good Constitutionalism: Recovering the Classical Legal Tradition* (Polity, 2022). For a critique of the authoritarianism in this movement, see Michael A Wilkinson, 'The Authoritarian Nature of Common Good Constitutionalism' (2024) *American Journal of Jurisprudence* 89 – 106.